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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

JEHAN ZEB MIR,

Petitioner, Plaintiff and Appellant,

v.

RICHARD G. FOSBURG, PERRY AH-TYE,

and HORACE WARDEN,

Respondents, Defendants and Appellees.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the decision of this Court in Chappell v. Wallace impose a per se prohibition on the filing of any actions by servicemen against their superiors, based on alleged constitutional violations (whether a Bivens-type action, an action under 42 U.S.C. §1981, or an action under 42 U.S.C. §1985), leaving no room for the consideration of whether there are insufficient "special factors counselling hesitation" in an individual case, and precluding the courts from any process of balancing factors indicating that such an action constitutes the plaintiff's only real opportunity for redress of constitutional wrongs suffered in the course of military service?

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STATEMENTS RE: JURISDICTION AND PROCEDURE

1. The district court had jurisdiction over the subject matter of plaintiff's action due to the removal of the action to that court under 28 U.S.C. §1442a. (Mir v. Fosburg, 646 F.2d 342 (9th cir. 1980).)

2. Jurisdiction in the Court of Appeals was premised on 28 U.S.C. §1291, in that plaintiff appealed from the final decision of the district court, entered on January 6, 1984.

3. Judgment of the Ninth Circuit was entered on June 23, 1985. The time period for filing the instant Petition for Writ of Certiorari is 90 days. (28 U.S.C. §2102(c).)

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit was filed on June

23, 1985, but was not published. A copy of the Opinion appears in Appendix A to the instant Petition.

The Order of the District Cout for the Southern District of California was entered on January 6, 1984, but no separate opinion was filed or published.

RELATED DECISIONS

Petitioner MIR has appealed to the Court of Appeals for the Ninth Circuit on four separate occasions, including the appeal for which review is sought herein. The resulting opinions of the court on the three prior occasions are to be found at the following citations:

1. Mir v. Fosburg, No. 73-2416 (9th Cir. July 8, 1974)
2. Mir v. Fosburg, 646 F.2d 342 (9th Cir. 1980)
3. Mir v. Fosburg, 706 F.2d 916 (9th Cir. 1983)

CASE HISTORY

Plaintiff, JEHAN ZEB MIR, originally filed his complaint in the San Diego, California, Superior Court on October 25, 1972, alleging discrimination by defendants in terminating plaintiff from the Thoracic Surgery Program at Balboa Naval Hospital. As the named defendants were all members of the United States Navy, the case was removed upon petition to the United States District Court for the Southern District of California on November 29, 1972.

On December 29, 1972, defendants filed a motion for dismissal or, in the alternative, for summary judgment, arguing that an official immunity for federal officers was applicable to the case. On February 22, 1973, the district court found that the plaintiff and defendants were all in the military service, subject to military discipline, and that Barr v.

Matteo, 360 U.S. 564 (1959) was controlling. The court dismissed the complaint on the ground that defendants were protected by official immunity.

Plaintiff appealed the dismissal to the Ninth Circuit Court of Appeals, which on July 8, 1974 remanded the case in light of Scheuer v. Rhodes, 416 U.S. 232 (1973), and further directed the district court to explore whether military administrative remedies were open to plaintiff. On remand, the district court determined that Scheuer, supra, was controlling as it affected official immunity in this case, and on January 10, 1975, denied defendants' motion to dismiss.

On March 21, 1975, a status conference was held with all parties to the action present. Thereafter, on March 24, 1975, the district court determined the case to be at issue. From October 17, 1975, until March 10, 1977, the parties

entered into a series of stipulations extending time for discovery and trial. On March 10, 1977, defendants filed a new motion for dismissal or for summary judgment, based on the theory that plaintiff had failed to allege any basis for federal jurisdiction in his complaint. After a hearing, the court on April 21, 1977, dismissed the complaint, with leave to amend, for failure to allege subject matter jurisdiction. An amended complaint was filed on May 20, 1977, but upon defendants' motion to dismiss, that complaint was dismissed with prejudice on August 5, 1977, also for want of subject matter jurisdiction.

On August 15, 1977, plaintiff acted through new counsel by filing a motion to set aside the dismissal and for leave to file a second amended complaint, which alleged a basis for federal jurisdiction. The district court denied the motion on

November 15, 1977, and plaintiff appealed to the Ninth Circuit.

Plaintiff's appeal contended that the district court had subject matter jurisdiction over the case by virtue of the removal of the case by defendants, and further contended that it was improper for the court to deny leave to file the proffered complaint, which contained several independent grounds for federal court jurisdiction. The court of appeals reversed the lower court's finding of no jurisdiction, and raised sua sponte certain issues involving the defense of immunity. The court stated that the availability of an absolute defense against state law claims would require a factual finding that the defendants were acting within the outer perimeter of their duties, an issue presented to the district court for further proceedings. The court also said that a qualified

immunity defense would be at issue, if plaintiff were to be allowed to amend his complaint to state federal constitutional claims. The question whether plaintiff's second amended complaint would be accepted for filing was presented to the district court for resolution. (Mir v. Fosburg, 646 F.2d 342 (9th cir. 1980).)

Upon remand, a hearing was set for September 15, 1980. On September 11, 1980, the case was transferred from the calendar of Judge GORDON THOMPSON, JR., to the calendar of Judge EARL B. GILLIAM, and the hearing on plaintiff's motion for leave to file the amended complaint was held on March 16, 1981. The court found that defendants would suffer no prejedice from the changes contained in the complaint, and granted leave.

On January 21, 1982, the Clerk of the district court noted the passage of six months' time without any indication of

proceedings being taken by plaintiff, including a failure to file the amended complaint for which leave had been granted, and on that basis gave notice that the instant case had been placed on the court's calendar for dismissal for want of prosecution, pursuant to Local Rule 237 of the Southern District of California. At the hearing, the court dismissed plaintiff's action for want of prosecution, and plaintiff appealed. The Ninth Circuit reversed, finding that the record revealed that no prejudice had been caused to the defendants during the relevant period of "delay." (Mir v. Fosburg, 706 F.2d 916 (9th Cir. 1983).)

On November 3, 1983, defendants filed the motion to dismiss or, in the alternative, for summary judgment which is the subject of the instant petition. Defendants argued that the recent Supreme Court ruling in Chappell v. Wallace, 462 U.S.

296, 103 S.Ct. 2362 (1983), supports their claim that plaintiff should not be allowed to pursue any claims against his former superior officers. After a hearing on December 19, 1983, the district court dismissed plaintiff's complaint, with 45 days' leave to file a further amended complaint. In its Order, the court stated that issues are controlled by Chappell and by Feres v. United States, 340 U.S. 135 (1950), and that defendants were being awarded summary judgment. Acting on the premise that the decision of the district court offered no meaningful opportunity to amend the complaint with any facts not already pleaded, plaintiff did not attempt to file a third amended complaint, and instead filed a Notice of Appeal to the Ninth Circuit on February 29, 1984.

The Ninth Circuit affirmed, in an opinion filed on June 23, 1985. The

Ninth Circuit applied the holding of its prior decision in Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), in which it stated that this Court's ruling in Chappell v. Wallace, supra, "'necessarily imposed a per se prohibition on the filing of Bivens-type actions by service-ment against their superiors' for alleged constitutional violations." (Appendix A at A11.) The court also stated that their analysis of the Chappell and Feres cases applied equally to the claims by plaintiff under 42 U.S.C. §1985(1). (Appendix A at A12-A13.) Finally, the court found that plaintiff had failed to plead sufficient material facts to support his claim based on 42 U.S.C. §1981. (Appendix A at A13.)

ARGUMENT IN FAVOR OF ALLOWANCE OF THE WRIT

I

CERTIORARI MUST BE GRANTED, TO SETTLE A CONFLICT BETWEEN HOLDINGS OF THE NINTH CIRCUIT AND THIS COURT, AFFECTING FUNDAMENTAL RIGHTS

The instant Petition addresses important issues of federal and constitutional law. At issue is the conflict between the needs of the military to have its own separate system of justice, and the needs of the individual people in the military to retain access to civilian courts for redress of constitutional wrongs.

The ruling in this case by the Ninth Circuit was based upon a prior Ninth

Circuit decision, Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983). (See Appendix A at A10-A14.) Petitioner urges this Court to investigate the conflict between Mollnow and the Supreme Court case Chappell v. Wallace, 462 U.S.296,103 S.Ct 2362 (1983). In Chappell, this Court stated:

> We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations.
>
> (Chappell v. Wallace, supra, 103 S.Ct. at 2368.)

In Mollnow, the court interpreted that general conclusion as follows:

> [W]e believe the Court necessarily imposed a per se prohibition on the filing of Bivens- type actions by servicemen against their superiors.
>
> (Mollnow v. Carlton, 716 F.2d 627, 630 (9th Cir. 1983).)

Petitioner insists that the Chappell ruling is not a simple absolute, and does not foreclose all actions by military personnel. Absolutes are not possi-

ble where the potential exists for rights at issue to be so sensitive as to outweigh all opposing factors. That potential was acknowledged in Chappell:

> Chief Justice Warren had occasion to note that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." [Citation omitted.] This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.
>
> (Chappell v. Wallace, supra, 103 S.Ct. at 2367.)

The Mollnow opinion renders this acknowledgement meaningless, and therein lies the legal conflict which Petitioner would have this Court resolve. Effect must be given to the plain meaning of the Court's words, which would not have been stated if they had not been meant.

Petitioner asserts that this is a case where the rights at stake outweigh the opposing considerations, and where

the status of plaintiff as a naval officer should not be held to preclude his action against certain superior officers. Upon a substantive review of this case, the Court will be asked whether it intended to create "black letter law" foreclosing such redress as an absolute matter.

Chappell may appear to present a settled conclusion, but its main thrust is the careful balancing process used to reach that particular conclusion. The settled appearance exists in part because the full scope of applicable legal policies is not presented in the Chappell case. The Court opinion explores only one side of the balance in depth, the side which opposes the rights of the individual involved; it probes only the question, at what point should the Bivens form of relief be restricted, on the basis that there are "special factors

counselling hesitation?" (Chappell v. Wallace, supra, 103 S.Ct. at 2364; Bivens v. Six Unknown Federal Narcotics Agents, supra, 403 U.S. at 396.)

It is in the companion case, Bush v. Lucas, 462 U.S. 367, 103 S.Ct. 2404 (1983), that this Court concurrently presented a thorough review of the duty and power of the federal courts to remedy constitutional violations. Opportunity for redress of constitutional wrongs is a fundamental concept. Chappell treats such considerations as assumed rather than repeating the analysis given in Bush. (Chappell v. Wallace, supra, 103 S.Ct. at 2364.) Nonetheless, it should be clearly recognized that the Court was weighing two sides of a very difficult balance in Chappell.

It is essential, in weighing the issues of this case, to establish a firm sense for the individual constitutional

rights which form the affirmative side of the balance, in favor of allowing a plaintiff to obtain redress. For example:

> The federal courts' powers to grant relief not expressly authorized by Congress is firmly established. Under 28 U.S.C. §1331 (1976), the federal courts have jurisdiction to decide all cases "aris[ing] under the Constitution, laws, or treaties of the United States." This jurisdictional grant provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, Bell v. Hood, 327 U.S. 678, 684 (1946), but also the authority to choose among available judicial remedies in order to vindicate constitutional rights.
>
> (Bush v. Lucas, supra, 103 S.Ct. at 2409.)

These considerations, and the concept of a balancing process, were drawn from predecessor cases, such as the Bivens case itself:

> Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is ... well

> settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Bell v. Hood .... The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress.
>
> (Bush v. Lucas, supra, 103 S.Ct. at 2410, quoting from Bivens v. Six Unknown Federal Narcotics Agents, supra, 403 U.S. at 396.)

Bivens and subsequent cases have developed the concepts on both sides of this balance. (E.g., Davis v. Passman, 442 U.S. 228 (1979); and Carlson v. Green, 446 U.S. 14 (1980).) Petitioner emphasizes that the affirmative considerations balancing in favor of the enforcement of rights are substantial in his case as well. He is eager to have the chance to demonstrate that they outweigh any "special factors" presented by the context of his case, but he is unable to proceed until this Court rejects the notion that the entire matter is to be

treated with an absolute rule.

The central consideration weighing in favor of a Bivens action is the fundamental belief that the Constitution must be enforceable directly by the individual, a concept which is the "very essence of civil liberty." (Davis v. Passman, 442 U.S. 228, 242 (1979).) Redress for violations of basic civil rights is itself a civil right, which all branches of government must hasten to provide, and the courts can only hold back from hearing complaints if they are convinced that an alternative means, giving proper redress, exists. "Proper redress" may fall short of "complete" relief (see e.g., Bush v.Lucas, supra 103 S.Ct. at 2408), but it must still respond to the essence of the injury in a fair and meaningful fashion. (See id. at 2417; Davis v. Passman, supra, 442 U.S. at 248; Carlson v. Green, supra, 446 U.S. at 18-19.)

In considering the opposite side of the balance, the Bush and Chappell opinions rely on similar "factors counselling hesitation." The inquiry in both cases is directed at whether the court's obligation to provide a remedy for constitutional violations is effectively discharged by a legislatively created remedial device or system.

The Chappell case found that the Uniform Code of Military Justice (10 U.S.C., Chapter 47) was a "comprehensive internal system of justice to regulate military life." (Chappell v. Wallace, supra, 103 S.Ct. at 2366.) That remedial system was found to offer adequate opportunity for redress under the circumstances of the case before it, and so a balance was established against the allowance of an action.

The conflict created by the Ninth Circuit's rulings in this case and in

Mollnow v. Carlton, supra, lies in the decision of the Court of Appeals to exalt, as an absolute, an end result from a certain line of case authority, and to ignore the process which those authorities used to reach that result. Rather than focusing the legal inquiry on the question whether the military justice system was adequate in each specific case, it treated the entire matter with a per se rule that an action by a serviceman against a superior is not permitted. (Id., 716 F.2d at 630; Appendix A at A11.) Such a per se rule is inconsistent with the fundamental rights involved, in that it forecloses the court's discretion to vindicate such rights when presented with the appropriate case. Petitioner has such a case to present, but the existence of the per se rule imposed by the Ninth Circuit acts as a complete bar to that action.

It is crucial that the conflict be resolved by this Court. So long as an absolute rule barring servicemen from civilian courts is allowed to exist, no meaning can be given to the statement in Chappell, quoted above:

> This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.
>
> (Chappell v. Wallace, supra, 103 S.Ct. at 2367.)

Certiorari to review the substantive issues in this case is essential, to resolve the conflict and restore meaning to such fundamental concepts.

II

THE SUBSTANCE OF PETITIONER'S CASE ILLUSTRATES THE SHORTCOMINGS OF A PER SE RULE WHICH IMPAIRS OR DENIES THE AVAILABILITY OF REDRESS FOR CONSTITITIONAL WRONGS

The analysis which the Chappell Court applied, in concluding that the Uniform Code of Military Justice (Title 10, U.S. Code, hereinafter UCMJ) was adequate to the situation presented, did not include full reference to the range of balancing considerations discussed above, but instead focused on the negative side of the balance, the "special factors counselling hesitation", which it found to exist in the normal military situation. The Court's reasons for "hesitation" can be divided into two components: the "special" nature of the military, and the existence of a remedial system created by

Congress.

There is a wealth of authority to establish the first component, the general premise that "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting." (Chappell v. Wallace, supra, 103 S.Ct. at 2365.) The need for a distinct form of discipline within the military has been applied by past authorities to justify the denial of normal judicial procedures and remedies, specifically in the areas of claims under the Federal Tort Claims Act for injuries incident to military service (e.g., Feres v. United States, 340 U.S. 135 (1950)), and private tort actions by individual service persons against superiors. (See Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965).)

But even when presented with this first component, the special disciplinary

needs of the military, the Court has premised its decisions equally on the second component, the existence of a remedial process, such as the UCMJ, or a scheme of compensation. (Chappell v. Wallace, supra, 103 S.Ct. at 2366-2367; see Feres v. United States, supra, 340 U.S. at 144-145.) Without this second component, the courts must hear actions by military personnel, or leave "the very essence of civil liberty" completely unprotected. The Court in Chappell was careful to premise its conclusion on a finding that procedures under the UCMJ did exist which addressed "complaints and grievances such as those presented by [the plaintiffs therein.]" (Chappell v. Wallace, supra, 103 S.Ct. at 2366-2367.)

The case of Petitioner MIR presents a factual and legal situation which is only superficially similar to Chappell and other "special disciplinary needs of the

military" cases. Dr. MIR was in the Navy, but he found himself in a distinctly non-military situation. His duties were essentially civilian in nature, and he was subject to a non-military professional code. He alleges treatment by the defendants involving discriminatory motive outside the scope of any military duty, which resulted in injury to his civilian career. And the military does not provide any remedy which can redress this injury, because the UCMJ is tailored to questions of military discipline in the course of military missions, and is not equipped to resolve issues, and grant appropriate relief, in the professional and civilian contexts presented by plaintiff.

A. The Non-Military Nature of Plaintiff's Duties.

The plaintiffs in Chappell alleged that discriminatory treatment by their superiors, in the making of routine duty assignments, led to their loss of pay and military advancement. The Court referred to such routine functions in the armed forces, and their relationship to the peacetime mission of military preparedness, as follows:

> The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection.
>
> (Chappell v. Wallace, supra, 103 S.Ct. at 2365.)

Such battlefield preparedness was not the controlling mission in the environment of the thoracic surgery department of the naval hospital, where plaintiff and defendants worked as members of a

highly complex profession. That profession demanded from them forms of discipline (beginning with the Hippocratic oath) which stand in a priority higher than the "inescapable demands of military discipline and obedience to orders."

Unlike the soldier engaged in a strictly military mission, a doctor is impelled by his profession to act to bring about the best treatment of his patients. Such action must, necessarily and frequently, involve the open and unsuppressed expression of any contradictory opinion held in good faith. Where the professional imperative conflicts with the military imperative, under normal, peaceful conditions it is the professional which must control.

Once the surgeon has committed his patient to the operating table, he is forced to act without any "habit of immediate compliance with military ...

orders." (Chappell v. Wallace, supra.) Especially where there is no particular military condition, that doctor must be in control, rendering the best care possible without regard to the existence of military discipline or command. Doctors cannot "train for wartime" by subjecting their professional judgment to unthinking obedience to orders. They must prepare for the battlefield without the practice of applying battlefield standards in non-emergent circumstances, because only in the reality of combat can a doctor begin to apply any standards which reduce the level of conduct required by his profession.

A further non-military facet to the factual situation presented by petitioner MIR is his presence in a residency program, operated by the military. The program, for which Dr. MIR joined the Navy, provided specialized professional

training to doctors in exchange for their service in the military. The Navy also provided evaluative data on these candidates for specialization, to the appropriate civilian medical specialty board. The program represents the operation by the Navy of a civilian function, in order to attract professionals into the service. The Navy had offered this training to plaintiff in exchange for extended service.

B. The Non-Military Nature of Plaintiff's Injuries.

The injuries which plaintiff has alleged go to the essence of this peacetime, residency-program nature of plaintiff's case, since the defendant's wrongful acts are cited for their impact on plaintiff's certification, and career, as a thoracic surgeon. The damages claimed by plaintiff do not derive from any loss

or reduction of pay or military status, nor from military penalties, nor from any injury cognizable in a military setting. The misdeeds of defendants, having occurred in a distinctly civilian setting, have damaged plaintiff as a civilian professional. The residency program which had been offered to plaintiff contemplated advancement in his civilian status as a doctor, and it was to that status that injury was done.

C. The Proper Non-Military Redress for Plaintiff's Claims.

The proper vehicle for plaintiff to resolve his claims is through a Bivens-type action in the district court. The instant case cannot simply be foreclosed by a reflexive application of Chappell v. Wallace, because the facts presented here fall so far outside the realm of considerations applied in Chappell.

The line of authorities from Bivens through Chappell all struggle with a balance between persuasive policies. The fundamental value placed on the vindication of constitutional rights, which plaintiff seeks here, must be given due consideration, and not treated with the disregard inherent in an automatic application of an apparent "rule." In Chappell, heavy emphasis was placed on the possibility of interference with the disciplinary and command structure of the military. No such interference is threatened here. The officers who are defendants acted not as military commanders, but as senior surgeons. The action is addressed not to military discipline but to professional discipline.

The courts are also asked to act where the military system for redress of wrongs cannot hope to succeed in rendering justice. Plaintiff's injuries cannot

be cured by restoring rank, awarding back pay, or correcting his military record. Plaintiff has had a substantial and valuable block of time carved out of his professional career and wasted by the wrongful and intentional actions of defendants, and the dark spot which they stamped upon plaintiff's professional reputation has taken years to overcome. Such injuries are simply not within the contemplation of the UCMJ, which can only afford remedies which are within the framework of military functions. Only the federal courts can provide the proper redress for the claims presented by plaintiff.

CONCLUSION

In Chappell, the Court stated:

> The special status of the military has required, the Constitution contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel.
>
> (Chappell v. Wallace, supra, 103 S.Ct. at 2367.)

The instant case illustrates that this description of the applicable legal structure cannot be blindly accepted as an absolute truth. All systems of justice are imperfect, and require the constant vigilance of their participants to find those imperfections and resolve them. The more difficult the resolution, the more the imperfection requires resort to fundamental considerations and values.

What is clearly inapproriate to the critical and complex nature of the values involved is a static, unquestioning

prohibition like that imposed by the Ninth Circuit in Mollnow. This Court has said that the question of access to the civilian courts cannot be foreclosed. Unless such a statement has no meaning, absolute rules are simply out of place.

In this case, plaintiff presents a claim raising fundamental constitutional concerns. While the military setting and status of the parties in the instant case appear to present cause for "hesitation," closer scrutiny reveals that the case does not threaten interference with the true needs of the military. The mission engaged in by plaintiff and defendants is not governed by the same strict standards of unquestioning obedience to the will of the superior, and the allowance of claims does not threaten the system. Further, the military is not armed with the judicial mechanism for redressing the injuries alleged.

Plaintiff has never had any option for the resolution of his claim other than to seek the protection of a federal court action. That action must be allowed to proceed.

Date:_____ Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit, in the instant case, Mir v. Fosburg, No. 84-5667, D.C. No. CV 72-0487 (9th Cir. June 23, 1985):

Appellant, Jehan Zeb Mir, an officer in the United States Navy and formerly a resident in thoracic surgery at Balboa Naval Hospital in San Diego, Appeals the dismissal this action pursuant to which he had sought relief for his allegedly unlawful termination. Mir challenges his dismissal from the Thoracic Surgery Residency Program under the United States Constitution, 42 U.S.C. §§1981 and 1985(1), and state-based tort law. The district court held that Chappell v. Wallace, 103 S.Ct. 2362 (1983), and Feres v. United States, 340 U.S. 135 (1950),

immunized defendant military personnel from thses types of actions. Jurisdiction is proper under 28 U.S.C. §§1291 and 1294.

The issues presented in this case are: first, whether there is a final, appealable order; and second, whether appellant's constitutional and state tort claims are barred. For the reasons hereafter stated, the district court's order is affirmed.

I.

On October 25, 1972, appellant Jehan Zeb Mir, a naval officer and resident in the Toracic Surgery Residency Program at Balboa Hospital, filed a complaint in the San Diego Superior Court against three physicians who were his naval superior officers, stationed at the hospital, alleging that he was wrongfully removed from the surgical residency program. On

November 27, 1972, the defendants removed this action to the United States District Court for the Southern District of California pursuant to 28 U.S.C. §1442(a) [sic]. In a second amended complaint, the basis of the present action, plaintiff asserts three causes of action. The first raises claims under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), 42 U.S.C. §§1981 and 1985(1). The second raises a state law claim for intentional interference with the plaintiff's employment. The third claim is for intentional infliction of emotional distress. In essence, the complain alleges that as a result of appellant's criticisms of defendant Fosburg and his staff, the defendants waged a personal vendetta against the appellant that resulted in his removal from the program. The complaint further alleges a conspiracy among

the three superior officers to interfere with appellant's right to work as a physician.

At the present time, appellant's action has been dismissed on four separate occasions by the district court, only to have been reinstated on three occasions by the Ninth Circuit. Most recently, on January 6, 1984, the district court entered a summary judgment order in favor of defendants./1 The order gave appellant forty-five days' leave to amend. Appellant did not amend by February 29, 1985 [sic], the date the forty-five day period elapsed, believing that the district court's decision provided no meaningful opportunity to amend the complaint.

II.

A.

The first issue presented by this

appeal is whether the district court's order is appealable. The historic policy of the federal courts has been that an appeal will lie only from a final decision. Andrews v. United States, 373 U.S. 334 (1963). A "final decision" is generally one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. See Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). An order that dismisses the entire action is final and appealable even if the dismissal is without prejudice. See Korgich v. Regents of New Mexico School of Mines, 582 F.2d 549 (10th Cir. 1978). A line of Ninth Circuit cases distinguishes between judgments that dismiss the action, and those that dismiss the complaint without expressly dismissing the action. Dismissal of the action is deemed to be a final judgment while dismissal of the complaint

is final only if it is clear the district court determined that the action could not be rescued by any amendment of the complaint. See California v. Harvier, 700 F.2d 1217 (9th Cir. 1983); Mark v. Greff, 521 F.2d 1376 (9th Cir. 1975).

The district court here found that plaintiff could not frame a cause of action because controlling case law immunized superior military officers from suits brought by individuals under their command. The court granted summary judgment, but gave plaintiff leave to amend within forty-five days. Plaintiff had already amended twice, and believed further amendment to be futile. Appellant's Brief at 5. Accordingly, plaintiff did not amend his complaint within the time permitted, but filed a timely notice of appeal. The summary judgment order can be regarded as a final order after passage of forty-five days, thus becoming

a final judgment from which appeal is proper./2

B.

The second issue raised on this appeal is the district court's holding that Feres v. United States, 340 U.S. [sic; page number is 135] (1950) and Chappell v. Wallace, 103 S.Ct. 2362 (1983), barred plaintiff's constitutional claims. The question presented is purely legal and thus de novo review applies. Vesey v. United States, 626 F.2d 627, 629 (9th Cir. 1980).

In Bivens, the Supreme Court held that an individual may recover damages from federal authorities for violation of Fourth Amendment rights. Subsequently, in Chappell, the Supreme Court ruled on the issue of whether enlisted personnel could sue their superiors under a Bivens-type theory of an implied cause of action

for violation of constitutional rights. Chappell and other enlisted personnel had brought an action alleging that duty assignments, performance evaluations, and penalties had been invoked in a racially-discriminatory manner. The Court stated that no remedy for a Bivens-type claim is available when "special factors counselling hesitation" are present. Id. at 2364.

In its analysis, the Court relied heavily on Feres v. United States, 340 U.S. 135, 146 (1950), which held that enlisted military personnel cannot press tort claims against the United States for injuries resulting from the negligence of fellow enlisted personnel when such injuries arise out of or in the course of activity incident to service. As the Court recognized in Chappell, Feres rests upon the "peculiar and special relationship of the soldier to his superiors

[and] the effects on [sic] the maintenance of such suits on discipline * * *." Chappell, 103 S.Ct. at 2365.

In reaching its decision, the Supreme Court also looked to the comprehensive internal system of justice that provided a forum for complaints such as those presented by plaintiffs. In short, the Court concluded that the existence of that forum, in conjunction with the need to maintain military discipline, requires that superior officers be immunized from Bivens-type actions.

Appellant attempts to distinguish Chappell by arguing that only those acts that are of a military nature ought to be precluded from a civil suit. Appellant argues that he was acting in a "nonmilitary" situation under a nonmilitary professional code./3 Furthermore, appellant contends that no remedy is available through the ordinary military channels

because the Uniform Code of Military Justice ("UCMJ") deals with questions of military discipline in the course of military, and not to his situation.

Furthermore, appellant argues that Chappell does not establish a per se rule barring all military plaintiffs from pursuing Bivens-type actions, but rather a requirement that courts study the "special factors counselling hesitation" in determining whether suits are appropriate in any given instance. This Court addressed this argument in Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), and rejected it. Mollnow, a former Air Force Reserve Pilot brought suit against his superiors, among others, for constitutional violations and for common law torts, claiming that his superiors conspired to have him removed from flight duty due to his criticisms about policies concerning the operation of jet aircraft.

The court explicitly held that in Chappell, the Supreme Court "necessarily imposed a per se prohibition on the filing of Bivens-type actions by servicemen against their superiors" for alleged constitutional violations. Id. at 630./4

The analyses presented in Chappell and Mollnow are particularly cogent in the present case. Contrary to plaintiff's argument, 10 U.S.C. §§938 and 1552 do provide redress under the UCMJ. While the remedies available under these statutes may not be as broad as plaintiff desires, they are all that Congress has chosen to make available. See Mollnow, 716 F.2d at 629. Furthermore, the potential for litigation by military personnel, whether they are acting in "military" or "civilian-like" situations at a given point in time, threatens the disciplinary requirements of the command structure.

C.

In addition to his Bivens-type claims, plaintiff also seeks to recover under 42 U.S.C. §§1981 and 1985(1). Section 1981 redresses racial discrimination so as to place all on equal footing in regard to legal rights and privileges. Shah v. Mt. Zion Hospital & Medical Center, 642 F.2d 268, 272 n.4 (9th Cir. 1981). Section 1985(1) applies to conspiracies to prevent "any person from accepting or holding any office * * * under the United States, or from discharging any duties thereof * * *." 42 U.S.C. §1985(1).

In Mollnow, this Court recognized that Chappell does not explicitly apply to federal statutory violations. However, we adopted the reasoning of Chappell and Feres to actions brought under 42 U.S.C. §1985 (1), recognizing that such actions involved the same risks to military discipline that are posed by the poten-

tial of tort actions. Chappell, Mollnow, and Feres do not address the issue of actions brought under 42 U.S.C. §1981. Under the facts and circumstances of this case, however, we need not determine whether the Chappell and Mollnow reasoning should operate to bar the §1981 claims of military personnel against their superiors. Although appellant alleges that the injuries he has suffered resulted from appellee's discrimination on the basis of race, he fails to plead any material facts or even to allege the racial group of which he is a member. Moreover, appellant has had no fewer than four opportunities, over the course of thirteen years, to properly allege a §1981 cause of action. Under these circumstances, dismissal of the claim may be appropriate. Cf. Dewitt v. Pail, 366 F.2d 682, 685 n.1 (9th Cir. 1966). Accordingly, we affirm the district

court's determination, notwithstanding its apparent reliance on other grounds. See Salmeron v. United States, 724 F.2d 1357, 1364 (9th Cir. 1983) (court of appeals may affirm district court's action on any ground finding support in the record).

D.

Aothough not clearly set forth, appellant's second and third causes of action appear to be state-based common law tort claims./5 As indicated above, both Feres and Mollnow hold that service personnel have no remedy against their superiors for common law tort claims, both negligent and intentional. Mollnow, 716 F.2d at 628. Thus, plaintiff cannot state a claim under federal constitutional or statutory law, or under state tort law.

AFFIRMED

FOOTNOTES:

1. The district court appears to have granted the defendants' motion to dismiss at the hearing with forty-five days' leave to amend. However, the final order, effective at the end of the forty-five days, was for summary judgment. Although the proper procedure is in fact dismissal, rather than summary judgment, see Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983); Mattos v. United States, 412 F.2d 793 (9th Cir. 1969), we will affirm the district court's order of summary judgment because the issue was not raised on appeal.

2. If a plaintiff appeals from an order that is not final because it dismissed the complaint but not the action, the appeal should be regarded as having been taken from subsequent order that dismissed the action. Ruby v. Secretary of United States Navy, 365 F.2d 385 (9th Cir. 1966), cert. denied, 386 U.S. 1011 (1967). Technically, no order was entered after the order of summary judgment with forty-five days leave to amend. But the order can be read as (1) an order allowing leave to amend, (2) to be followed in forty-five days with the entry of a summary judgment order.

3. Appellant was also subject to the Military Code.

4. We note, as did the Supreme Court, that Chappell does not bar military personnel from obtaining all redress in civilian courts for constitutional wrongs suffered in the course of

military service. See Chappell v. Wallace, 103 S.Ct. 2362, 2367. The Court in Chappell held only that "entitled [sic] military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." Id. at 2368 (footnote omitted; emphasis added [sic]). The Supreme Court, however, has countenanced claims by military personnel against superior officers for other types of redress. See, e.g., Brown v. Glines, 100 S.Ct. 594 (1980) (action for declaratory judgment that certain Air Force regulations violated petitioner's rights under the First Amendment); Parker v. Levy, 94 S.Ct. 2547 (1974) (habeas relief sought on the basis of a vaguenes challenge to certain military regulations). Accordingly, we do not intend to suggest that either Mollnow or Chappell bars suits seeking remedies other than damages for constitutional wrongs suffered by military personnel at the hands of superiors.

5. Appellant, in his second amended complaint, alleges that jurisdiction for these causes of action is based on the doctrine of pendent jurisdiction. He does not specifically label them state-law claims.